No. 19673

United States
COURT OF APPEALS
For the Ninth Circuit

SIMPSON TIMBER CO. and
GRACE LINE, INC.,

Appellants,

v.

EZRA PARKS,

Appellee.

SIMPSON TIMBER CO.,

Appellant,

v.

GRACE LINE, INC. and
BRADY-HAMILTON STEVEDORE CO.,

Appellees.

GRACE LINE, INC.'S PROTECTIVE PETITION FOR REHEARING

Appeal from the United States District Court for the District of Oregon

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GRACE LINE, INC.'S PROTECTIVE PETITION FOR REHEARING

Appeal from the United States District Court for the District of Oregon

Appellee Grace Line, Inc. petitions the Court for a rehearing and reinstatement of Grace Line, Inc.'s judgment of indemnity over against appellant Simpson Timber Company in the event the Court grants a rehearing to appellee Exra Parks and reinstates his judgment.

Grace Line, Inc.'s petition for rehearing and reinstatement is to protect itself as Grace Line, Inc.'s judgment of indemnity over against Simpson Timber Company was reversed by the Court.

If rehearing is granted and Parks' judgment reinstated, Grace Line, Inc.'s judgment against Simpson Timber Company should be reinstated for the following reasons:

1. In deciding the issues of indemnity the trial court found as a fact that:

> Simpson "knew or should have known the regular and customary practice of using cargo stowed aboard a vessel as working surface by the men loading or unloading the vessel" (R. 163).

Further on the issue of indemnity, the trial court found as a fact that:

> Simpson's negligence was the "primary, efficient, and sole proximate cause of Parks' said accident and resulting injuries" (R. 165).

2. This Court's original decision affirmed the trial court's judgment granting Grace Line indemnity over against Simpson Timber Company as being consistent with prior decisions of the Court, as well as being justified on other grounds. There has been no dissent.

CONCLUSION

Grace Line, Inc.'s judgment of indemnity over against Simpson Timber Company should be reinstated if the Court reinstates Ezra Parks' judgment.

WOOD, WOOD, TATUM, MOSSER & BROOKE
JOHN R. BROOKE
Attorneys for Appellee-Petitioner
Grace Line, Inc.

CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this petition I have examined Rule 23 of the United States Court of Appeals for the Ninth Circuit, and in my opinion the foregoing is in full compliance with that rule. I further certify that this petition is in my judgment well founded and not imposed for delay.

JOHN R. BROOKE
Of Attorneys for Petitioner

No. 19,673

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MAUTZ, SOUTHER, SPAULDING, KINSEY
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AUTHORITIES

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Attorneys for Simpson Timber Co.

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TO THE HONORABLE FREDERICK G. HAMLEY, JAMES R. BROWNING and WALTER ELY, Circuit Judges, constituting the court in the original hearing:

Simpson Timber Co. respectfully submits that the court has substantially erred in the decision of its majority dated December 3, 1965 and, in doing so, has upheld a judgment which effects a miscarriage of justice and which rests upon a principle hitherto foreign to the law of torts. In view of the far-reaching consequences of the majority opinion, and in view of the greatly increased and extended liability the majority opinion places on a manufacturer, Simpson respectfully suggests that this case be reheard en banc and makes such suggestion in accordance with the provisions of Rule 23 (5) of the Rules of this Court.

The Majority of the Court Erred in Holding That the Manufacturer of a Packaged Product Is Liable for Personal Injuries to a Longshoreman Sustained While Misusing Its Product.

The majority holding extends the liability of a manufacturer to new and unreasonable lengths. Moreover, the majority opinion is in direct conflict with the opinion of the Tenth Circuit in *McCready* v. *United Iron & Steel Co.*, 272 F.2d 700 (C.A. 10, 1959). The manufacturer in *McCready* was in precisely the identical position as *Simpson*. The dissenting opinion of this court (Op. 18-19) fully discusses the applicability of *McCready*. Furthermore, the majority opinion appears to virtually admit its inability to satisfactorily distinguish *McCready* (Op. 6).

The attempt by the majority (Op. 6) to distinguish

Cohagan v. *Laclede Steel Co.*, 317 S.W.2d 452 (Mo. 1958) fails. See Dissent (Op. 19-20).

In addition to the conflict with the Tenth Circuit, the majority opinion is in direct conflict with the substantive law of the State of Oregon. The majority apparently bases its opinion upon a "risk spreading" or "enterprise liability" theory.

The Supreme Court of Oregon has recently specifically refused to adopt the concept of enterprise liablity. In *Wights* v. *Staff Jennings, Inc.*, — Or. —, 81 O.A.S. 187, 193-195, 405 P.2d 624 (1965), the Supreme Court rejected the risk-spreading tenets of enterprise liability.

The majority opinion appears to assert that Simpson knew, or reasonably should have known, that a general practice of using cargo (including doors) as walking surfaces existed in the longshoring industry. *Simpson was not the shipper of the doors;* it merely delivered the doors on order of the purchaser, f.o.b. dock; at that time its contact with the doors terminated. Indeed, the Trial Judge clearly indicated that Simpson had no knowledge of the method longshoremen used in loading vessels. He stated:

> "I don't think there is any evidence in this case regarding the actual loading into the ships as far as Simpson is concerned."

The majority opinion points out that "the manufacturer had sold 16,000 to 18,000 doors to overseas shipment annually for years." (Op. 4). While technically true, at most, Simpson sold 800 to 900 *cutout* doors annually and this was the type of door involved in the litigation (See App. Br. 8). Only 2% of the doors manufactured were exported.

Simpson didn't know whether the doors were going o be "containerized" or whether they would be shipped n barges or other ocean-going vessels.

Would this court charge Simpson with liability had he doors been constructed of a thin veneer in place of he opening for the glass? Would this be a trap? Must manufacturer foresee use of a *quality* product as a valking surface? This is what the majority holds, and s frightening economic and legal implications appear to e obvious.

The majority asserts that Simpson should know that its doors are to be exported it should package them or that purpose. No mention is made concerning the ability of the ship or the stevedore to inspect the packging to make sure it is secure and *proper for use as a valking surface.* The evidence clearly indicated that the hipper (not Simpson) shipped the doors pursuant to ariff (see Simpson Exhibit 34, App. Br. 17), and the ariff itself failed to specify what would constitute prop- r packaging for export. *If the ship and the stevedore new that the doors were to be used for a walking surace, shouldn't the tariff indicate that the package should e so constructed so that it could be so used?*

There was no evidence from which the fact-finder ould reasonably infer that the non-shipper manufacurer knew, or reasonably should have known, of the ongshore custom of utilizing cargo as a walking surface. See Op. 17-18; compare Op. 3). If the question is one f reasonable foreseeability the liability of the manufacurer is foreclosed by the decisions in *McCready*, supra, nd *Cohagan*, supra. The jury was not free to disbelieve

the manufacturer's testimony and conclude that it knew of the risk (Op. 4), *because there was no evidence for such a "conclusion." Nor does the false assumption that Simpson was engaged in packaging doors for export* (Op. 5 and N8) *aid the majority conclusion.*

Moreover, the Tenth Circuit decision (1958) of *Parkinson* v. *California Co.,* 255 F.2d 265, exonerate Simpson from liability. In *Parkinson,* the manufacturers of liquid propane gas were sued for personal injuries suffered by ultimate consumers, resulting from an explosion. The retailer of the gas knew that new steel tanks leased to the consumer would destroy the artificial odor in otherwise odorless propane gas, and the plaintiff contended that there was an additional duty upon the manufacturer, beyond the duty to properly odoroize the gas. to warn that the odor would be destroyed if it were placed in new steel containers. Plaintiffs contended that the defendants owed a duty to warn purchasers of the peculiar characteristics of the product and how certain methods of handling it, which might be foreseen, could make the product inherently dangerous. The Tenth Circuit held that the manufacturer of propane gas could not be held liable to a consumer for failure to give such a warning.

Even the United Kingdom has moved away from the extreme position in the Polemus case (the unforeseeable result). [1921] All E.R. Rep. 40; [1921] 3 K.B. 560. See *Overseas Tank Ship* v. *Morts Dock & Engineering Co., Ltd.,* [1961] 1 All Eng. 404, 100 A.L.R. 2d 928 (1961).

The Court Further Erred in Refusing to Reduce the Judgment Rendered for Plaintiff to the Amount of the Prayer in the Complaint.

The dissenting opinion (13-16) completely analyzes the evidence and indicates that the award was gross and excessive. Simpson asserts that to allow the award to stand would be an unconstitutional deprivation of property without due process of law (which includes due notice). See *Parker* v. *S.I.A.C.*, 81 Or. Adv. Sh. 589, 592 (1965) — Pac. (2) —.

The Court Erred in Giving Judgment in Favor of Grace Line Against Simpson for Indemnity Because Common Law Indemnity Is Not Permissible in Maritime Torts.

The majority decision is in direct conflict with the doctrine established in *Halcyon Lines* v. *Haenn Ship Sealing and Refitting Corp.*, 342 U.S. 282 (1952). It also appears to be in direct conflict with the decision of Judge W. H. T. Sweigert in *Mickle* v. *M/V HENRIETTA WILHELM SCHULTE* (U.S. D.C. Cal. 1960), 188 F. Supp. 77.

CONCLUSION

Simpson respectfully submits that a majority of the court erred in holding the manufacturer liable for an unforeseeable misuse of its product, in permitting a recovery in excess of the ad damnum, in permitting indemnity, and in failing to remand for a new trial on the ground of plaintiff's attorney's misconduct.

Respectfully submitted,

Attorneys for Simpson Timber Co.
KENNETH E. ROBERTS,
ROBERT T. MAUTZ,

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief I have examined Rule 23 of the United States Court of Appeals for the Ninth Circuit and that in my opinion the foregoing brief is in full compliance with that rule and that this petition for rehearing is in my judgment well founded and is not interposed for delay.

KENNETH E. ROBERTS